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No. 80-2005

In the Supreme Court of the United States

October Term, 1980

ROBERT F. WALSH,
Petitioner,

vs.

FORD MOTOR COMPANY,

and

RAYMOND A. CONNOR, Administrator,
THE OHIO BUREAU OF WORKERS' COMPENSATION,

and

THE INDUSTRIAL COMMISSION OF OHIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION OF RESPONDENT, FORD MOTOR COMPANY

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Ford International Finance Corp.
Transcon Insurance Ltd.
Ford Motor Company Carribean, Inc.
Eveleth Taconite Co.
Fordson Coal Co.
Ford Products Co.
Ford Communications, Inc.
Environ, Inc.
Ohio Production Corp.
Predelivery Service Corp.
Ford Export Corp.
Ford Motor Land Development Corp.
Detroit Downtown Development Corp.
Ford Motor Properties, Inc.
Greenfield Properties, Inc.
Ghia, Inc.
Ghia, Sp. A.
Risk Services, Inc.
Dearborn Capital Corp.
Ford Leasing Development Corp.
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Ford Motor Dealership Facilities Co.
Parklane Insurance Co.
Ford Latin America, S.A. de C.V.
Ford Aerospace & Communications Corp.
Logistic Services Corp.
Aeronutronic Overseas Services, Inc.
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Philco da Amazonia LTDA.

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Dearborn Capital Corp.
Ford Motor Credit Co.
Ford Motor Credit Company Int'l.
The American Road Insurance Co.
Ford Life Insurance Co.
Vista Insurance Co.
Vista Life Insurance Co.
American Road Services Co.
Ford Consumer Credit Co.
American Road Equity Corp.
Ford Credit Equity Corp.
Ford Motor Credit Company of Iowa
Ford Credit of Australia Ltd.
Ford Credit of Australia Wholesale Ltd.
Ford Consumer Discount Co.
Ford Credit of Canada Ltd. - Credit Ford Du Canada, Limitee
Canadian Road Credit Co., Ltd.
Credit Ford S.A.
Philco Finance Corp.
Ford France, S.A.
Ford Motor Company of New Zealand Ltd.
Ford Motor Credit Company of New Zealand Ltd.
Ford Motor Company of Canada, Ltd.
Ford Motor Company of Australia Ltd.
Ford Sales Company of Australia Ltd.
Ford Motor Company Private Ltd.
Ford Motor Company of South Africa Ltd.
Ford Credit South Africa Ltd.
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Essex Manufacturing
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Ford Lio Ho Motor Co., Ltd.

Ford Asia-Pacific, Inc.
Ford Philippines, Inc.
Ford Motor Company (Japan) Ltd.
Ford Finance Company of Japan, Ltd.
Ford Motor Company of Malaysia, SDN. BHD.
Japan Automatic Transmission Co., Ltd.
Ford Motor Company of Argentina S.A.
Metalurgica Constitucion S.A.
Transax, S.A.
Plan Ovalo S.A.
Ford Motor Company, S.A. (Mexico)
Ford Motor Company del Peru, S.A.
Ford Motor Company de Venezuela, S.A.
Productos Industriales, C.A.
Ford Brasil S.A.
SAO Francisco LTDA.
Bongotti S.A.
Ford Administracio e Consorcios LTDA.
Ford Financsiadora S.A.
Distribuidora Ford de Titulos e Valores Mobiliarios LTDA.
Transglobal Corretagen de Seguros LTDA.
Ford (Uruguay) S.A.
Ford Mid-East and Africa, Inc.
Ford Motor Company (Egypt) S.A.E.
Ford Motor Company Ltd. (England)
Ford Tractor (Belgium) Ltd.
Henry Ford and Son (Sales) Ltd.
Ford Motor Credit Company, Ltd. (England)
Ford Financial Trust Ltd.
Automotive Finance Ltd.
Dagenham Motors Ltd.
Ford Personal Import Export Ltd.
Ford-Werke AG
Saar-Industrie, GmbH
Ford Verisicherungs Vermittlungs, GmbH
Ford Credit Bank AG

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Ford Espana S.A.
Ford Credit S.A.
Ford Leasing S.A.
Ford of Europe Inc.
Ford Motor Company (Belgium) N.V.
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Ford Italiana S.p.A.
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Ford Lusitana, S.A.R.L.
Ford Motor Company Aktiebolag
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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions stated at page 2 of the Petition for a Writ of Certiorari, Respondent considers pertinent the following:

Federal Rules of Appellate Procedure, Rule 4(a)(5) - Appeals in Civil Cases:

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Federal Rules of Civil Procedure, Rule 77(d) - Notice of Orders or Judgments:

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

Ohio Rules of Civil Procedure, Rule 50(B) - Motion for Judgment Notwithstanding the Verdict:

(B) Motion for judgment notwithstanding the verdict. Whether or not a motion to direct a verdict has

been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

Ohio Rules of Civil Procedure, Rule 59 New Trials:

(A) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

(1) Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

(7) The judgment is contrary to law;

(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

(B) Time for motion. A motion for a new trial shall be served not later than fourteen days after the entry of the judgment.

(C) Time for serving affidavits. When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has fourteen days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty-one days either by the court for good cause shown or by the parties by written stipulation. The court may permit supplemental and reply affidavits.

(D) On initiative of court. Not later than fourteen days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party.

The court may also grant a motion for a new trial, timely served by a party, for a reason not stated in the party's motion. In such case the court shall give the parties notice and an opportunity to be heard on the matter. The court shall specify the grounds for new trial in the order.

Ohio Revised Code §2505.03, Final order may be appealed; exception:

Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, tribunal, or commission may be reviewed as provided in sections 2505.04 to 2505.45, inclusive, of the Revised Code, unless otherwise provided by law, except that appeals from judgments of judges of county courts upon questions of law and fact shall be taken as provided in sections 1921.01 to 1921.16, inclusive, of the Revised Code.

Committee Note to 1946 Amendment to Federal Rules of Civil Procedure, Rule 77(d):

(Paragraph 3 excerpted)

Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may

take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment. Any party may, of course, serve timely notice of the entry of a judgment upon the adverse party and thus preclude a successful application, under Rule 73(a) for the extension of the time for appeal.

Staff Notes Ohio Rules of Civil Procedure, Rule 58:

Rule 58 has been amended to provide that "A judgment is effective only when filed with the clerk for journalization."

In effect, Rule 58, before the amendment, provided for the same time for the effective date of a judgment, but in slightly different language. Apparently the language caused some confusion. The amendment simplifies the language governing the effective date of the judgment.

The effective date of a judgment is extremely important for one reason among others because appeal time runs from the entry of a judgment or final order. (Rule 54 defines a judgment as including a "decree" "or any order from which an appeal lies."

Is should be noted in passing that selecting a day certain for the effective date of a judgment is somewhat troublesome. The effective date could be when the judge signs the judgment. Or when the signed judgment is filed

with the clerk. Or when the clerk journalizes the judgment. Or when the parties are notified of the judgment. The least troublesome effective date is the date selected by the rule, i.e., "A judgment is effective only when filed with the clerk for journalization." When the judgment is filed, the clerk should stamp it immediately and journalize it promptly. It should also be noted that the rule is silent as to how a party shall be notified of the entry of judgment. The notification problem remains a matter for local practice.

Rules of the Supreme Court of the United States, Rule 21(1)(h) (Excerpted):

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

STATEMENT OF THE CASE

Respondent considers the following additional information relevant to the Statement of the Case contained at page 2 of the Petition for Writ of Certiorari:

The Motion for Relief from Judgment filed by Petitioner in the Lorain County Court of Common Pleas con-

tains no suggestion that the failure by the court to give him actual notice of the entry of judgment constitutes a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. Likewise, the Assignments of Error and Brief filed by Petitioner in the Ohio Ninth District Court of Appeals and the Memorandum in Support of Jurisdiction filed by Petitioner in the Supreme Court of Ohio contain no suggestion of the constitutional arguments that petitioner is now asserting before this Court. The original papers filed by Petitioner in state proceedings have been reproduced in the Appendix.

ARGUMENT

1. PETITIONER ASSERTS THAT DUE PROCESS REQUIRES THAT LITIGANTS RECEIVE ACTUAL NOTICE OF THE ENTRY OF JUDGMENT BY A TRIAL COURT. PETITIONER FAILED TO PRESENT THIS ISSUE DURING THE COURSE OF STATE COURT PROCEEDINGS. ACCORDINGLY, THIS COURT IS WITHOUT JURISDICTION TO CONSIDER SUCH ISSUE.

Appellate courts in both the Federal and Ohio Systems generally limit the scope of their inquiry on appeal to those issues raised in the trial court. Failure to make timely objection or to bring to the attention of the trial judge the claimed error, will result in a waiver of that ground as a basis for reversal on appeal. *McGrath v. Manufacturers Trust Co.*, 338 U.S. 241 (1949); *State v. Williams*, 51 Ohio St. 2d 112, 364 N.E.2d 1364 (1977) *vacated in part* 438 U.S. 911 (1978); *Yuin v. Hilton*, 165 Ohio St. 164, 134 N.E.2d 719 (1956). Further, an appellant who has failed to present an issue to the trial court for determination will not be permitted to raise that issue for the first time on

appeal. *Dunn v. United States*, 284 U.S. 390 (1932); *Pennsylvania R.R. Co. v. Illinois Brick*, 297 U.S. 447 (1936); *Public Service Comm'r. v. Havemeyer*, 296 U.S. 506 (1936) *rehearing denied* 297 U.S. 727 (1936); *Webb v. Grimm*, 116 Ohio App. 63, 186 N.E.2d 739 (1961).

Ohio courts will not permit a party who has relied solely on state grounds to frame his appeal in terms of a federal question not raised before the trial court. *Kalish v. Trans World Airlines*, 50 Ohio St. 2d 73, 362 N.E.2d 994 (1977). However, if the party has properly raised a constitutional question in the lower court, he will be permitted to further define his constitutional argument in his presentation to the Court of Appeals. *City of Columbus v. Rodgers*, 41 Ohio St. 2d 161, 324 N.E.2d 563 (1975).

The rule which limits the scope of review to those issues raised at trial has not been followed in cases where fundamental rights have been invaded and the interests of substantial justice require judicial intervention. *United Bhd. of Carpenters & Joiners v. United States*, 330 U.S. 395 (1946); *Weems v. United States*, 217 U.S. 349 (1910). This exception does not apply in the present case which involves an individual's right to receive further workers' compensation benefits under Ohio statutory provisions.

When a case originates in state court, this Court's jurisdiction is limited under the provisions of 28 U.S.C. §1257 to the review of those federal issues raised and decided in the course of state proceedings. *Slagle, et al. v. Ohio*, 366 U.S. 259 (1961); *Int'l. Steel & Iron Co. v. Nat'l. Surety Co.*, 297 U.S. 657 (1936). As this Court would have no jurisdiction to consider a federal question not asserted in state court, the Rules of the United States Supreme Court, Rule 21(1)(h) specifically requires that the party requesting a writ of certiorari demonstrate by reference to the record

that the federal issue was timely presented in the counts below. Petitioner has not met this requirement.

The present case was disposed of by the trial court, which granted Respondent's motion for summary judgment. Petitioner did not perfect thereafter a timely appeal from that judgment within the 30-day period prescribed in the Ohio Rules of Appellate Procedure, Rule 4(A). He then filed a motion for relief from judgment pursuant to the Ohio Rules of Civil Procedure, Rule 60(B). This motion for relief from judgment contained no suggestion of the constitutional argument now being presented by Petitioner, but was limited to issues of state law. There was, likewise, no mention of the constitutional issue in Petitioner's Assignments of Error before the Ohio Ninth District Court of Appeals, or in his Memorandum in Support of Jurisdiction before the Supreme Court of Ohio.

Petitioner having failed to present the constitutional question during proceedings at any of the three levels of the state judicial system, the issue should not be considered. Accordingly, the Petition for a Writ of Certiorari should be denied.

2. DUE PROCESS OF LAW DOES NOT REQUIRE A TRIAL COURT TO GIVE THE PARTIES ACTUAL NOTICE OF ITS ENTRY OF FINAL JUDGMENT.

The Ohio Rules of Civil Procedure, Rule 58, provides that a judgment by a trial court is effective when it is signed by the judge and filed with the clerk for journalization. The clerk is thereupon required to promptly journalize the judgment entry. The Staff Note for Rule 58 indicates that those who drafted the rule considered setting the point of finality at other times in the proceeding, including the time when the parties receive actual notice of

the judgment. The Staff Note explains that the drafters decided to make the judgment "final" at the time of filing with the clerk for journalization rather than at some other point because it was the best way of establishing a sure and definite date from which the period for taking an appeal can be calculated. Furthermore, the Staff Note reflects the drafters' intention to leave to the discretion of the local courts the matter of giving notice to the litigants of the filing of a judgment entry. Except as required by local rule, there is no requirement in Ohio that litigants be given actual notice of the entry of judgment.

It has long been a maxim in Ohio that "a court speaks only through its journal." *State, ex rel. Industrial Comm'n. v. Day*, 136 Ohio St. 477, 26 N.E.2d 1014 (1940); *Carter v. Johnson*, 55 Ohio App. 2d 157, 380 N.E.2d 358 (1978). Although some courts have adopted local rules which provide additional notice to the parties of the entry of judgment, no other notice is required. In Ohio a party to litigation is held to have constructive notice of that which is contained in the court's journal. For this reason, Ohio courts have held that the failure of a party to receive actual notice of judgment in time to perfect an appeal is neither a denial of due process of law nor a valid basis for a court to grant relief from judgment under the Ohio Rules of Civil Procedure, Rule 60(B). *Town & Country Drive-In Shopping Centers, Inc. v. Abraham*, 46 Ohio App. 2d 262, 348 N.E.2d 741 (1975).

The right to appellate review of a decision by an Ohio court is provided for in Ohio Revised Code, §2505.03. The right to appeal is conditioned upon a party's compliance with the Ohio Rules of Appellate Procedure, Rule 4(A). This rule provides that a notice of appeal to be timely must be filed within 30 days of the entry of the judgment ap-

pealed from unless a motion for a new trial or a motion for judgment notwithstanding the verdict has been timely filed with the trial court in compliance with Ohio Civil Rules 59 and 50(B), respectively. The only authorization for extending this time period is the one provided in Rule 4(A). It is the party's responsibility to ascertain the date on which the judgment entry was filed so as to insure the timely filing of his notice of appeal. This does not impose a great burden on litigants, since counsel for a party can readily determine this date by actual inspection of the court's journal or by placing a telephone call to the clerk of the court.

If the federal courts, the Federal Rules of Civil Procedure, Rule 77(d) requires the clerk to serve notice of the entry of orders or judgments on every party to the action not in default for failure to appear. The Advisory Committee Notes to the 1946 Amendment, which added the notice provisions make it clear that the notice is intended only for the convenience of the parties and that failure by the clerk to give notice does not stay the time for taking an appeal. The fact that no notice was given is to be considered by the district court in ruling on a request for an extension of time to file a notice of appeal under the Federal Rules of Appellate Procedure, Rule 4(a)(5). However, under the Appellate Rule, a court may only extend the appeal period for an additional 30 days, and once that period has expired, there can be no appeal despite the clerk's failure to give notice in violation of the rule. *Lanthrop v. Oklahoma City Housing Authority*, 438 F.2d 914 (10th Cir. 1971) *cert. denied* 404 U.S. 840 (1971); *Lord v. Helmandollar*, 348 F.2d 780 (D.C. Cir. 1965) *cert. denied* 383 U.S. 928 (1966) *rehearing denied* 384 U.S. 947 (1966). The rule which provides for parties to receive notice of judgments and orders does not bestow an interest in which a party can claim a due process right. *Central Operating*

Co. v. Utility Workers of America, 491 F.2d 245 (4th Cir. 1974).

Thus the federal system, like Ohio, clearly places on the prospective appellant "the duty of following the progress of the action and advising himself of the decision he wishes to protest." *Long v. Emery*, 383 F.2d 392, 394 (10th Cir. 1967).

The Ohio Rules of Civil Procedure require that the judgment entry be promptly journalized after it is filed with the clerk. The fact that a final judgment has been entered can be ascertained with little difficulty even in those Ohio jurisdictions not having a local rule providing for actual notice to the parties. Hence, the absence of a requirement that litigants receive actual notice of the filing of judgment does not constitute a denial of due process of law as Petitioner alleges.

CONCLUSION

Petitioner did not claim at any time during the state court proceedings that the trial court's failure to give actual notice of its entry of judgment had denied him due process of law under the Fourteenth Amendment of the Constitution of the United States. As the federal question was not timely asserted and the state courts did not have an opportunity to rule on the issue, this Court is without jurisdiction to consider the argument.

In the State of Ohio a court speaks only through its journal. A party to litigation has constructive notice of all entries contained therein. The necessity for a party to periodically check the court's journal does not impose so great a burden so as to constitute a denial of due process rights under the United States Constitution.

For the foregoing reasons, Respondent, Ford Motor Company submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

MEMORANDUM IN SUPPORT OF JURISDICTION FILED WITH THE SUPREME COURT OF OHIO

Case No. 80-1786

IN THE OHIO SUPREME COURT

AN APPEAL FROM THE COURT OF APPEALS OF LORAIN COUNTY

ROBERT F. WALSH,
Plaintiff-Appellant,

vs.

FORD MOTOR COMPANY, *et al.*,
Defendant-Appellees.

MEMORANDUM IN SUPPORT OF JURISDICTION

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STATEMENT OF THE CASE

On January 2, 1976, the Plaintiff-Appellant, Robert F. Walsh, filed an application for an increase in his percentage of permanent partial disability in his Workers' Compensation Claim No. 417084-22. A hearing was held on this application on October 29, 1976, to determine if his disability had, in fact, increased. At that time, the Defendant-Appellee, Ford Motor Company, requested that the application be dismissed because the Plaintiff-Appellant had entered into a settlement agreement in another Workers' Compensation claim. On July 6, 1977, the Cleveland Regional Board of Review referred the appeal of this decision to a staff hearing officer. On May 8, 1978, the Industrial Commission of Ohio denied the Plaintiff-Appellant's application and affirmed the decision of the hearing officer to dismiss the application for an increase in permanent partial disability benefits.

A Notice of Appeal and Complaint were filed in the Lorain County Common Pleas Court on July 3, 1978. The trial court, on November 9, 1979, heard arguments on a Motion for Summary Judgment filed by the Defendant-Appellee, Ford Motor Company. On November 29, 1979, the trial court entered a judgment granting the Motion

for Summary Judgment. The Plaintiff-Appellant filed a Motion for Relief from Judgment on March 12, 1980. The trial court denied this Motion on April 28, 1980. An appeal was then filed to the Ninth District Court of Appeals on May 23, 1980. On November 5, 1980, the Court of Appeals entered its decision overruling the Plaintiff-Appellant's first assignment of error.

PROPOSITION OF LAW NO. 1

A Motion Filed Pursuant to Civil Rule 60(A) and (B) Should Be Heard on Its Own Merits, Irrespective of the Provisions of Appellate Rule 4(A).

As the Court of Appeals points out in its decision, the problem raised by this appeal is a recurring one. However, like the trial court, it indicated that the 30-day appeal period is absolute and, therefore, any attempt to "circumvent" it will be denied.

The present state of the Rules of Procedure have created a situation from which not even Houdini, in one of his greatest moments, would be able to extricate himself.

The Plaintiff-Appellant has been able to establish that the requirements of Rule 60 have been met. There are valid grounds for granting relief from the trial court's decision of November 29, 1979. However, because of the provisions of Appellate Rule 4(A), neither the trial court nor the Court of Appeals would grant the Motion to support this decision. The Appellate Court has cited the case of *Bosco v. City of Euclid* 38 Ohio App. 2d 40 (1974).

When a court denies such a motion, a merger takes place. Civil Rule 60 becomes one with Appellate Rule 4(A). It loses its character and its personality because of a potential appeal. As a matter of fact, it loses its effect as a method of relief under the trial system in this state.

This conflict permits no avenue of relief for the party seeking to use Rule 60.

In the instant case, the Plaintiff-Appellant has met the criteria set forth by this court in *GTE Automatic Electric v. ARC Industries*, 47 Ohio St. 2d 146 (1976). Unlike the events in *McCue v. Buckeye Union Ins. Co.* 61 Ohio App 2d 101 (1979), there was nothing surreptitious about the Motion for Relief from Judgment; however, the court's words at the end of the decision do have application:

> "Thus, if a trial court vacates and reenters a judgment other than for the purpose of accommodating an appellant whose appeal time has lapsed, the reasons must be demonstrated on the record. In other words, if a trial court wants to avoid a jurisdictional attack under similar facts, but has a valid reason for vacating and reentering a judgment, the better practice would be for the trial court to state its reason on the record." at p. 106.

Apparently, trial courts can and will deny such a motion as long as the present conflict exists. Therefore, leave to appeal should be granted in this case in order to resolve this continuously perplexing problem. This court has the jurisdiction and the ability to resolve the conflict that has arisen between trial practice (Rule 60) and appellate procedure (Rule 4(A)). Rule 60 should not be permitted to become a eunuch in the palace of justice.

Respectfully submitted,

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ASSIGNMENTS OF ERROR AND BRIEF FILED WITH OHIO NINTH DISTRICT COURT OF APPEALS

Case No. 3054

COURT OF APPEALS OF OHIO
NINTH DISTRICT
LORAIN COUNTY

ROBERT F. WALSH,
Plaintiff-Appellant,

vs.

FORD MOTOR COMPANY, *et al.*,
Defendant-Appellees.

BRIEF AND ASSIGNMENTS OF ERROR
OF APPELLANT

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STATEMENT OF CASE

On January 2, 1976, the Appellant, Robert F. Walsh, filed an application for an increase in his percentage of permanent partial disability in his Workers Compensation Claim No. 417084-22. A hearing was held on October 29, 1976, to determine if his disability had, in fact, increased. At that time, the Appellee, Ford Motor Company, requested that the application be dismissed because the Appellant had entered into a settlement agreement in another claim. On July 6, 1977, the Cleveland Regional Board of Review referred the appeal of this decision to a staff hearing officer. On May 8, 1978, the Industrial Commission of Ohio denied the Appellant's application. On July 3, 1978, a Notice of Appeal and Complaint were filed in the Lorain County Common Pleas Court. On November 9, 1979, the trial court heard arguments on a Motion for Summary Judgment that was filed by Ford Motor Company. On November 29, 1979, the trial court entered a judgment granting the Motion. The Appellant filed a Motion for Relief from Judgment on March 12, 1980. The trial court denied this Motion on April 28, 1980. The instant appeal was filed by Robert F. Walsh on May 23, 1980.

STATEMENT OF FACTS

On May 13, 1965, Robert F. Walsh was an employee of Ford Motor Company in Lorain County, Ohio. During the course of his employment, he sustained an injury to his head and upper back. His claim for Workers Compensation benefits was recognized by his employer and the Bureau of Workers Compensation. On January 2, 1976, Robert F. Walsh filed an application for an increase in his percentage of disability from 25% to 35% based upon a medical report from Dr. Finley F. Neuman.

Prior to this event, the Appellant sustained another injury (to his arm) while working at Ford Motor Company on March 18, 1973. On February 13, 1975, he entered into a settlement agreement with his employer to settle this claim (518271-22) for $1,375. Neither the claimant nor his attorneys considered, at that time, that they were settling any other claim except No. 518271-22. It was not until the hearing before the Industrial Commission that he became aware of the fact that Ford Motor Company had considered all his claims to be settled.

ASSIGNMENTS OF ERROR

First Assignment of Error: The trial court erred in denying the Appellant's Motion for Relief from Judgment.

Second Assignment of Error: The trial court erred in granting Ford Motor Company's Motion for Summary Judgment.

LAW AND ARGUMENT

Assignment of Error 1:

The trial court erred in denying the Appellant's Motion for Relief from Judgment.

On March 12, 1980, approximately three and one-half months after the trial court entered its decision of November 29, 1979, Robert F. Walsh filed a Motion for Relief from Judgment pursuant to Rule 60(A) and (B) of the Ohio Rules of Civil Procedure. The basis for this request was that neither the Appellant nor the Appellees nor any of their representatives had received a notice from the court that it had entered its decision or its reasons for entering the decision. Such a decision was a final, appealable order. *Hensley v. Henry* (1980) 61 Ohio St. 2d 277; *GTE Automatic Electric v. ARC Industries* (1976) 47 Ohio St. 2d 146.

Rule 60 reads in part:

(A) Clerical mistakes:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders . . .

(B) Mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, etc.:

On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

1. mistake, inadvertence, surprise or excusable neglect; . . .

5. any other reason justifying relief from the judgment. The motion shall be made within a reasonable time . . . .

At the time of the hearing on November 9, 1979, the trial court indicated that its ruling would be made on or before November 26, 1979. On March 4, 1980, counsel for Appellant called the court to ascertain the status of the Motion for Summary Judgment. At that time, he was advised that a decision, granting the Motion, had been made on November 29, 1979. The trial court did not only not notify the parties about its decision, it did not mail a copy of its memorandum which it had prepared to send but failed to do so.

It is not unsual for a court to take several months to render a decision in such a matter. However, Civil Rule 58 states:

> *Subject to the provisions of Civil Rule 54(B), upon a general verdict of a jury or upon a decision announced, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it. A judgment is effective only when filed with the clerk for journalization. Entry of the judgment shall not be delayed for the taxing of costs.*

In *GTE Automatic Electric v. ARC Industries*, the Ohio Supreme Court established the following criteria for granting a 60(B) Motion:

> *"To prevail on a motion brought under Civil Rule 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civil Rule 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civil Rule 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken."*

Standing alone, this rule gives any party to a lawsuit the opportunity to correct an error, oversight or injustice. However, it appears a trial court cannot grant this relief merely to avoid Appellate Rules 3 and 4 which require that an appeal must be filed within "30 days of the date of the entry of the judgment or order appealed from."

In *McCue v. Buckeye Union Insurance Co.* (1979) 61 Ohio App 2d 101, the Cuyahoga County Court of Appeals addressed this question and tried to prevent the question from arising again. The head notes read in part:

> *". . . In such a case the time for appeal begins to run from the time at which the original judgment was entered and not from the time of vacation and reentry of the same judgment."*

However, in conclusion, the court states in part:

> *"Thus, if a trial court vacates and reenters a judgment other than for the purpose of accommodating an appellant whose appeal time has lapsed, the reasons must be demonstrated in the record. In other words, if a trial court wants to avoid a jurisdictional attack under similar facts, but has a valid reason for vacating and reentering a judgment, the better practice would be for the trial court to state its reason on the record."* at p. 106.

The journal entry of November 29, 1979, was neither based upon a "general verdict of a jury" nor "upon a decision announced."

The Court of Appeals and the Ohio State Supreme Court announce its decisions not only on a merit docket or legal publication, but they, also, advise the parties in writing. Certainly, such a requirement is not too much to ask of the trial court. The practice of law is quickening

its pace as each year passes, but the reason for its existence does not change, i.e., to provide justice for each citizen in an orderly manner.

The trial court's decision, denying the Motion for Relief from Judgment, should be overruled and the motion should be granted.

Assignment of Error 2:

The trial court erred in granting Ford Motor Company's Motion for Summary Judgment.

1. It is a matter of record that the appellant settled Claim No. 518271-22 with the Ford Motor Company; however, the settlement was limited to that Workers Compensation claim alone. In support of this proposition, the Appellant submitted a copy of his Affidavit, his attorney's Affidavits, the Settlement Agreement, the Industrial Commission record of proceedings, and the grammatical analysis by Joseph A. Tomba, along with his Brief in Opposition to the Motion for Summary Judgment (Exhibits A-E, Appendix).

The claimant states rather unequivocally that at no time during the settlement neogtiations to settle Claim No. 518271-22 was any other claim discussed: ". . . Affiant further states that there was no consideration offered or expressed for him to contract with Ford Motor Company for settlement of any other claim except the claim which was settled. Furthermore, he had no intention of settling any other claim." Affidavit of Appellant—Appendix, Exhibit B.

The claimant was represented by counsel during the settlement negotiations. Neither attorney considered the settlement to apply to any other injury except the one in Claim No. 518271-22.

". . . 7. From my part of the negotiations leading to settlement of Claim Number 518271-22, I can say that there was no consideration in that settlement for the settling of any other claim. All discussions concerned Claim Number 518271-22 and no other claim was discussed by myself and the employer's attorneys." Affidavit of Benjamin B. Sheerer—Appendix, Exhibit C.

Settlement discussions for Claim No. 518271-22 were initiated on January 14, 1975, between John D. Campbell, an associate of Mr. Sheerer, and David Schmidt, one of the attorneys representing Ford Motor Company. Mr. Campbell states the following in his Affidavit:

". . . 6. It was my understanding that the offer of $1,375.00 was to settle only case number 518271-22 and in that light considered the amount offered to be adequate." Affidavit of John D. Campbell—Appendix, Exhibit C.

The order of the Industrial Commission is dated March 1975. The third paragraph of the order reads as follows:

> "It is further ordered that upon the payment of the sum of $1,375.00 to the claimant by the employer that the claimant will have been fully compensated in accordance with *the terms set forth in the agreement* and that the employer, the Industrial Commission of Ohio and the State Insurance Fund will be fully discharged and released from any and all liability in regard *to this claim*, past, present and future, and that *all the claim* shall be forever closed." (emphasis added) Record of Proceedings—Appendix, Exhibit D.

The claimant, his representatives and the Industrial Commission are in agreement on the issue of which claim was being settled. The employer's position must be reviewed in light of the agreement itself.

It is not uncommon for a court to review a statute or an agreement in terms of syntax. *State of Ohio v. Dugger* (1975) 49 Ohio App 2d 220, *Riley v. Cincinnati* (1976) 46 Ohio St. 2d 287. In light of this fact, the settlement agreement was submitted to an English teacher for a grammatical analysis. His conclusion: "This agreement does not settle all claims that Mr. Walsh had with Ford Motor Company." Report of Joseph A. Tomba—Appendix, Exhibit E.

Mistake or ignorance are circumstances that may make a release invalid. *Perry v. O'Neil*, 78 OS 200. See also 47 *O. Jur.* 2d Release, Sec. 13. The plaintiff was not aware of Ford Motor Company's intentions nor can they be assumed to be his. In order to be effective, both parties must understand the effect of the release. It should have been applied only to Claim No. 518271-22.

Based upon the Complaint and the information provided in the Brief in Opposition to the Motion for Summary Judgment, the Motion should have been denied and the case should have been presented to a jury for a decision on whether Robert F. Walsh should have been able to continue to participate in the Workers' Compensation Fund of the State of Ohio.

Civil Rule 46(C) provides in part that:

> *". . . Summary judgment shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party*

being entitled to have the evidence or stipulation construed most strongly in his favor."

In *Vetovitz Bros., Inc. v. Kenny Construction Company* (1978) 60 Ohio App 2d 331, the court said in part:

> *"Summary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try. It must be awarded with caution, resolving doubts and construing evidence against the moving party . . . . A successful motion for summary judgment rests on the two-part foundation that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."* (emphasis added) p. 332.

2. Appellant's appeal to Common Pleas Court was proper under Ohio Revised Code 4123.519. It was not an appeal that went to the extent of disability. ORC 4123.519 says in part:

> *"The claimant or the employer may appeal a decision of the industrial commission in any injury case other than a decision as to the extent of disability, to the court of common pleas of the county in which the injury was inflicted . . ."* (emphasis added).

The order of t Industrial Commission of Ohio dated May 11, 1978, denied the plaintiff the right to continue to participate in the Workers Compensation Fund. The effect of the order was to terminate the claim due to a settlement in another claim for an unrelated injury.

The relief sought by the Appellant was not to have the court determine his percentage of disability but, rather, that he should have the opportunity to seek it at all. *Zavatsky v. Stringer*, 56 Ohio St. 2d 386 (1978); *Smith v. Krouse*, 54 Ohio St. 2d 369 (1978).

The trial court's decision was in error. The matter should have been decided by a jury on its merits.

CONCLUSION

The trial court erred in denying the Appellant's Motion for Relief from Judgment. The trial court in granting the Ford Motor Company's Motion for Summary Judgment was contrary to the facts and to law. The matter should be remanded to the trial court for further proceedings.

Respectfully submitted,

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MOTION FOR RELIEF FROM JUDGMENT FILED WITH THE LORAIN COUNTY COURT OF COMMON PLEAS

Case No. 83258-78

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

ROBERT F. WALSH,
Plaintiff,

vs.

FORD MOTOR CO., *et al.*,
Defendants.

MOTION FOR RELIEF FROM JUDGMENT

Now comes the plaintiff, ROBERT F. WALSH, by and through his attorney, James H. French, and requests that this court grant him relief from the judgment which was rendered on November 29, 1979, and enter a new date for its decision in regard to the Defendant's Motion for Summary Judgment for the reasons set forth in the accompanying brief.

Respectfully submitted,

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BRIEF

Pursuant to Rule 60(A) and (B) of the Ohio Rules of Civil Procedure, the plaintiff requests that the judgment the court entered on November 29, 1979, be vacated for the reason that neither he nor his attorney received a notice from the court that a decision had been entered on the Motion for Summary Judgment. The court's decision on the Motion for Summary Judgment is a final, appealable judgment. *Hensley v. Henry* (1980) 61 Ohio St. 2d 277; *GTE Automatic Electric v. ARC Industries* (1976) 47 Ohio St. 2d 146.

Rule 60 reads in part:

(A) Clerical mistakes:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders . . .

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On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

1. mistake, inadvertence, surprise or excusable neglect; . . .

5. any other reason justifying relief from the judgment. The motion shall be made within a reasonable time . . .

On March 4, 1980, counsel for the plaintiff called the court to ascertain the status of the Motion for Summary Judgment. At that time, he was advised a decision, granting the motion, had been made on November 29, 1979. Prior to that date, counsel for the plaintiff did not contact the court because he assumed that the court would notify the parties of its decision.

Civil Rule 58 states:

> *Subject to the provisions of Rule 54(B), upon a general verdict of a jury or upon a decision announced, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it. A judgment is effective only when filed with the clerk for journalization. Entry of the judgment shall not be delayed for the taxing of costs.*

The Motion for Summary Judgment and the Brief in Opposition had been filed with the court by May 30, 1979. A hearing was set for November 9, 1979, at which time the court indicated that a ruling would be made on or before November 26, 1979. It is not uncommon or unusual for a court to delay its ruling in such matters. Counsel for plaintiff assumed that the court had done just that in this instance. At the time counsel for plaintiff called the court to review the status of this matter, he was told that a notice had been sent. However, the court's office was unable to locate the file to verify this information.

CONCLUSION

Pursuant to Rule 60(B)(1) and (5), the plaintiff requests the court grant his Motion for Relief from Judgment and review its decision granting the Motion for Summary Judgment in order to avoid a substantial injustice.

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